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NOTES

THE CONSTITUTIONALITY OF EVIDENCE CODE SECTION 413 IN CRIMINAL CASES

Section 413 of the new California Evidence Code, which becomes operative January 1, 1967, provides:

In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

The 1965 United States Supreme Court holding in *Griffin v. California*¹ has placed in question the validity of section 413 in light of the constitutional privilege against self-incrimination. The *Griffin* rule "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."² The purpose of this note is to examine section 413 and the effect of the *Griffin* rule upon its validity.³

The California Comment Rule

California first allowed a criminal defendant to be a witness in his own trial in 1866.⁴ Three years later, *People v. Tyler*⁵ brought before the California Supreme Court the issue of comment by the prosecutor on the failure of the accused to testify. The court reversed Tyler's conviction, holding that such comment was inconsistent with the defendant's rights under the California constitution.⁶

Tyler was followed for sixty-five years until the California constitution was amended in 1934. The addition provides:

[B]ut in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.⁷

The amendment was proposed following studies made by the American Law Institute⁸ and the American Bar Association.⁹ The passage of the amendment placed California in accord with the views of the Model Code of Evidence published in 1942, but contrary to the laws of a vast majority of the states.¹⁰

¹ 380 U.S. 609 (1965).

² *Id.* at 615.

³ This note is not concerned with the validity of section 413 in civil cases.

⁴ Cal. Stat. 1865, ch. 644, §§ 1-2, at 865 (1866).

⁵ 36 Cal. 522 (1869).

⁶ CAL. CONST. art. I, § 8 (1849), now CAL. CONST. art. I, § 13 (1879).

⁷ CAL. CONST. art. I, § 13 (initiative amendment adopted Nov. 6, 1934).

⁸ ALL PROCEEDINGS 202-18 (1930-1931).

⁹ 56 A.B.A. REP. 137-52 (1931). See generally Bruce, *The Right to Comment on the Failure of the Defendant to Testify*, 31 MICH. L. REV. 226 (1932).

¹⁰ See 8 WIGMORE, EVIDENCE § 2272, at 427 n. 2 (McNaughton rev. 1961, Supp. 1964).

The comment rule was refined in 1946 in *People v. Adamson*.¹¹ The California Supreme Court held that there was a distinction between the *evidence* the accused fails to explain or deny, and the accused's invocation of the *privilege* against self-incrimination.¹² The former was a proper subject for comment; but comment on the latter was considered a penalty for invoking a privilege, and, therefore, was unconstitutional.

Adamson further held that the inference from unexplained or undenied evidence could be made only from the evidence which was within defendant's "power" to explain or deny.¹³ The court went on to say that the prosecution must first prove every element of the crime without the aid of the inference.¹⁴ In other words, a *prima facie* case must be made out before comment is allowed.

On appeal to the United States Supreme Court,¹⁵ the case was argued on the theory that the comment rule was violative of the fifth amendment's protection against self-incrimination, as applied to the state courts by the due process clause of the fourteenth amendment. Rejecting this contention, the Court followed its decision in *Twining v. New Jersey*,¹⁶ where it had refused to apply the fifth amendment to state courts. As for the California comment rule, the provision was assumed to be in violation of the fifth amendment for purposes of argument only.¹⁷ Thus, the question eventually brought before the Court in *Griffin* was left undecided.

In 1964, the Supreme Court discarded the doctrine of *Twining* and *Adamson* and held, in *Malloy v. Hogan*,¹⁸ that the fifth amendment was applicable in state criminal trials via the fourteenth amendment.

Subsequent to the *Malloy* decision, but prior to *Griffin*, the California Supreme Court in *People v. Modesto*¹⁹ once again had an opportunity to consider the comment rule. This time it was tested in light of the guarantees of the fifth amendment. The court surmised that the jury will probably draw inferences from accused's silence anyway, and indicated that the comment and instruction serve to clarify the matter.²⁰ Moreover, the court felt that the rule was fair since the prosecution must make out a *prima facie* case before comment is allowed.²¹ Finally, the court pointed out that the federal no comment rule which had been laid down in *Wilson v. United States*,²² was based on a federal statute,²³ rather than a constitutional provision, and thus was not binding upon the states.²⁴

In summary, at the time of *Griffin*, the essential limitations on the California

¹¹ 27 Cal. 2d 478, 165 P.2d 3 (1946).

¹² *Id.* at 488, 165 P.2d at 8.

¹³ *Id.* at 489, 165 P.2d at 9. This point was first discussed in *People v. Albertson*, 23 Cal. 2d 550, 584-87, 145 P.2d 7, 24-26 (1944) (concurring opinion).

¹⁴ 27 Cal. 2d at 489-90, 165 P.2d at 9.

¹⁵ *Adamson v. California*, 332 U.S. 46 (1947).

¹⁶ 211 U.S. 78 (1908).

¹⁷ 332 U.S. at 50.

¹⁸ 378 U.S. 1 (1964).

¹⁹ 62 Cal. 2d 436, 42 Cal. Rptr. 417, 398 P.2d 753 (1965).

²⁰ *Id.* at 452-53, 42 Cal. Rptr. at 426-27, 398 P.2d at 762-63.

²¹ *Id.* at 451, 42 Cal. Rptr. at 426, 398 P.2d at 762.

²² 149 U.S. 60 (1893).

²³ 18 U.S.C. § 3481 (1948).

²⁴ 62 Cal. 2d at 448-49, 42 Cal. Rptr. at 427, 398 P.2d at 760.

comment rule,²⁵ reflecting thirty-one years of judicial interpretation, were: (1) The prosecution must prove every essential element of the crime before comment can be made on accused's failure to explain or deny evidence against him, (2) the inference may be drawn only from evidence within the power of the defendant to explain or deny, and (3) the inference is to be drawn only from the evidence and not from exercise of the privilege against self-incrimination.

The Griffin Case

Griffin was accused of murder. He chose not to testify. The court instructed:

As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.²⁶

Griffin was found guilty of first degree murder and sentenced to death. The judgment was affirmed by the California Supreme Court.²⁷ On certiorari to the United States Supreme Court,²⁸ the case was argued on the theory that by reference to the accused's failure to testify, the defendant was compelled either to risk self-incrimination or face an unfavorable inference by the jury. The Court concurred with this theory.

The reasoning in *Modesto*, that the jury will make an adverse inference from the silence of the accused regardless of comment, was answered by the Court in the following passage: "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."²⁹

To the *Modesto* conclusion that the federal no comment rule laid down in *Wilson* was based on a federal statute and not on the Constitution, the Court replied that if, in the *Wilson* opinion, the words "fifth amendment" are substituted for "act" or "statute" where proper, the reasoning of *Wilson* is pertinent to state criminal trials.³⁰

Thus, the Supreme Court impliedly struck down as unconstitutional the California comment rule and the applicable clause in section 13 of article I of the state constitution.³¹ This is because the comment rule allows an inference to be made, through comment and instruction, from defendant's personal lack of explanation or denial. Section 13 of article I is couched in language which also points to defendant's personal testimony: "*his* failure to explain or to deny by *his* testimony." The holding in *Griffin*, which prohibits comment or instruction to

²⁵ See generally Note, 39 So. CAL. L. REV. 120 (1966); Note, 38 So. CAL. L. REV. 167 (1965).

²⁶ 380 U.S. at 610; See also CAL. JURY INSTRUCTIONS CRIMINAL (51 Rev.).

²⁷ *People v. Griffin*, 60 Cal. 2d 182, 32 Cal. Rptr. 24, 383 P.2d 432 (1963).

²⁸ *Griffin v. California*, 380 U.S. 609 (1965).

²⁹ *Id.* at 614.

³⁰ *Id.* at 613-14.

³¹ The *Griffin* holding necessarily invalidates CAL. PEN. CODE §§ 1093(6), 1127 in situations where the privilege against self-incrimination is invoked.

the effect that defendant's silence is evidence of guilt, necessarily leads to the following question: What is the effect of the *Griffin* rule upon section 413 of the Evidence Code?

The Origin of Section 413

Sections 412 and 413 were originally part of one section which was thought to reflect sections 1963(5)-(6)³² and 2061(6)-(7)³³ of the Code of Civil Procedure.³⁴ But one phrase was added to section 2061(6)-(7) by the Law Revision Commission in a preliminary draft, which eventually became section 413 of the Evidence Code. This addition provides: "[I]nferences unfavorable to a party may be drawn from any evidence of facts in the case against him when such party has failed to explain or deny such evidence or facts by his testimony"³⁵ This is almost the same wording used in Evidence Code section 413. That it was meant to express the constitutional provision of section 13 of article I can be seen from the following comment to section 913 of the Evidence Code:

Inferences may be drawn only from the evidence in the case and the defendant's failure to explain or deny such evidence. . . . Section 413 of the Evidence Code expresses the principle underlying this constitutional provision [section 13 of article I]³⁶

It seems, then, that section 413 has its origin from two sources: (1) The "failure to explain or to deny" phrase reflects, in part, the principle of section 13 of article I of the California constitution, which was condemned in *Griffin*,³⁷ and (2) the "willful suppression of evidence" phrase, which is a modified version of section 1963(5) of the Code of Civil Procedure.³⁸

³² CAL. CODE CIV. PROC. § 1963 provides in part: "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind 5. That evidence willfully suppressed would be adverse if produced; 6. That higher evidence would be adverse from inferior being produced"

³³ CAL. CODE CIV. PROC. § 2061 provides in part: "The jury, subject to the control of the Court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the Court on all proper occasions 6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore, 7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

³⁴ Revised Memorandum 64-33 of the California Law Revision Commission, May 25, 1964 (unpublished memorandum in the office of the California Law Revision Commission, School of Law, Stanford University, Stanford, Cal.).

³⁵ 6 CAL. LAW REVISION COMM'N, REPORTS, RECOMMENDATIONS & STUDIES 1041, 1045 (1964) [hereinafter cited as CAL. L. REVISION COMM'N].

³⁶ CAL. EVIDENCE CODE § 913, comment.

³⁷ The California Supreme Court in *People v. Bostick*, 62 Cal. 2d 820, 823, 44 Cal. Rptr. 649, 650-51, 402 P.2d 529, 530-31 (1965) held: "That portion of section 13 of article I of the California Constitution which purports to authorize such comment must bow to the superior mandates of the Fifth and Fourteenth Amendments to the United States Constitution."

³⁸ See text accompanying note 70 *infra*.

Although section 13 of article I mentions the word "comment," (referring to prosecution's statements to a jury) section 413 of the Evidence Code states only that "the trier of fact may consider." In other words, section 413 allows an inference to be drawn, but says nothing about how the trier of fact is to know that it should be drawn.³⁹ If the trier of fact is a jury, it could be told to draw the inference either by comment or instruction. The jury might also draw the inference on its own in the absence of comment or instruction. If the trier of fact is a judge, he will know from reading section 413 that an inference may be drawn. Of these four possibilities *Griffin* involved only two: comment and instruction. Therefore, *Griffin* did not settle the question of the validity of drawing an inference since it was confined to comment and instruction. Before this question can be discussed, it must be made clear just what inference is involved in section 413.

Distinction Between Inference From Evidence and Inference From a Privilege

The *Adamson* opinion carefully pointed out two inferences which must be distinguished: First, there is an inference drawn from evidence which stands unexplained or undenied.⁴⁰ Second, there is an inference drawn from the failure of the accused to take the stand.⁴¹ The comment to section 412 also points out this difference:

Sections 412 and 413, on the other hand, deal with the inference to be drawn from the evidence in the case; and the fact that a privilege has been relied on is irrelevant to the application of these sections.⁴²

The principle is recognized as a basic law of evidence. Professor Wigmore says:

It is true that the burden is on the prosecution . . . and that the accused is not required by any rule of law to produce evidence. But nevertheless he runs the risk of an inference from nonproduction. This seeming paradox . . . has misled a few courts to deny that any inference may be drawn.⁴³

The instruction in the *Griffin* case⁴⁴ did not distinguish between defendant's silence and evidence which is uncontradicted. An example serves to illustrate: *D* is accused of murder. He refuses to testify. The prosecution introduces evidence of circumstances within defendant's knowledge which tends to make out a case against *D*. The court instructs:

Case I: "Defendant's refusal to take the stand may be considered as evidence of his guilt."

Case II: "The evidence presented against defendant is within his personal knowledge, yet he has made no attempt to explain or to deny these facts by his testimony."

³⁹ The legislative committee comment to section 913 of the Evidence Code suggests that section 413 allows comment: "Thus, for example, it is perfectly proper under the Evidence Code [section 413] for counsel to point out that the evidence against the other party is uncontradicted."

⁴⁰ 27 Cal. 2d at 488, 165 P.2d at 8.

⁴¹ *Ibid.*

⁴² CAL. EVIDENCE CODE § 412, comment.

⁴³ 8 WIGMORE, EVIDENCE § 2273, at 450 (McNaughton rev. 1961).

⁴⁴ See note 26 *supra* and accompanying text.

Case III: "The prosecution's evidence has not been contradicted by the evidence presented by the defense counsel. This circumstance may be considered as lending weight to prosecution's evidence."

The instruction in the *Griffin* case was similar to *case II*. It was, in light of the fifth amendment, equally as fatal as *case I* since it called attention to the defendant's personal silence. The language in *case III*, whether communicated to the jury by instruction or comment, is valid as a rule of evidence and does not violate the *Griffin* rule since defendant could refute the evidence by introducing evidence other than his own testimony.⁴⁵

Section 413 makes the same mistake as the instruction in *Griffin* by referring to "the party's failure to explain or to deny by *his testimony*." If comment or instruction are given in the exact language of section 413, they will violate the *Griffin* rule. Therefore, section 413 must be construed to allow comment or instruction similar to *case III* in order to avoid invalidation on constitutional grounds. It should be interpreted to mean that "the party's failure to explain or to deny by *his evidence*" can be a proper subject for comment and instruction. If the courts are unwilling to follow this interpretation, then the section should be amended to give it this meaning. Section 413 would then stand for the proposition expressed by Wigmore. If the section is amended as suggested, or if the courts are willing to give the section a broad construction consistent with *case III*, then section 413 taken together with section 913 would make the proper distinction between comment or instruction on defendant's silence, as opposed to comment or instruction on uncontradicted evidence.

The Future of Section 413

A reasonable argument can be offered to support the proposition that section 413 applies to situations other than the one considered in *Griffin*, and is therefore valid as a rule of general policy.⁴⁶ The following discussion considers some of these situations in which the section may be valid.

⁴⁵ In *Langford v. United States*, 178 F.2d 48, 55 (9th Cir. 1949), it was held that "except in those special cases where it appears that the accused himself is the only one who could possibly contradict the government's testimony . . . the prosecutor may properly call attention to the fact that the testimony of the government witnesses has not been contradicted." *Accord*, *Desmond v. United States*, 345 F.2d 225 (1st Cir. 1965). These cases reveal a qualification to the proposition that comment may call attention to uncontradicted evidence. The prosecutor must take care to see that it would be possible for defense to contradict with evidence other than defendant's personal testimony. Otherwise, the comment would be in violation of the fifth amendment since it would call attention to the defendant's reliance on the privilege.

⁴⁶ In the January, 1965 RECOMMENDATION PROPOSING AN EVIDENCE CODE, the California Law Revision Commission's comment to section 913 contained the following language: "Nonetheless, the *Malloy* decision has at least cast doubt on the validity of the California rule—reflected in Article I, Section 13 of the California Constitution and Evidence Code Section 413—when a federal constitutional privilege is involved." However, in the legislative committee comment to section 913, this phrase was removed. The omission leads to two possible conclusions: either the legislature intended to give the provision broad effect; or it merely attempted to evade the constitutional issue. *Compare* 7 CAL. L. REVISION COMM'N 164 (1965), with CAL. EVIDENCE CODE § 913, comment.

The Validity of the Inference

There are three inferences in this discussion which must be clearly distinguished: First, an inference from the accused's failure to take the stand; second, an inference from the accused's failure to explain or deny evidence against him by his own testimony; and third, an inference from uncontradicted evidence. As already discussed, the third inference is valid as a rule of evidence, does not violate *Griffin*, and may be brought to the jury's attention by comment or instruction.

The validity of the second inference, which is what section 413 allows, is not so clear. *Griffin* held that the jury may not be told that it may make the second inference by comment or instruction.⁴⁷ Thus, the question narrows to whether the second inference may be drawn by the trier of fact on its own. In other words, may the trier of fact consider the failure of the accused to explain or deny evidence against him by his own testimony, without the aid of instruction or comment?

A negative answer to this question could be reached in the following way. *Griffin* did not distinguish the first and second inferences; both were equally invalid as subjects of comment or instruction. The Supreme Court held, in *Bruno v. United States*,⁴⁸ that a defendant had a right, based on the federal no comment statute, to an instruction which prohibited the jury from making the first inference on its own.⁴⁹ That is, the jury could not allow defendant's refusal to take the stand to enter into its thinking on the issue of guilt. Now if the reasoning in *Griffin*,⁵⁰ that "fifth amendment" can be substituted for "federal no comment statute,"⁵¹ is extended to the present circumstances, then it could be argued that the fifth amendment gives an accused a right to a *Bruno*-instruction in state criminal trials. And if there is no distinction between the first and second inferences, then the accused would also have a right to an instruction prohibiting the second inference from being made at all. Therefore, the second inference would be invalid.

There is reason to doubt the soundness of this conclusion since the *Griffin* opinion seemed particularly scornful of a procedure which "solemnizes" the defendant's silence into evidence against him through comment and instruction.⁵² But the opinion seems to allow the jury some latitude in what it infers on its own by observing that "What the jury may infer, given no help from the court, is one thing."⁵³ This is contrasted with what they may infer with the help of the court or counsel. It has not been established that the fifth amendment even gives the accused a right to an instruction which prohibits the jury from drawing the first inference.⁵⁴ It is a somewhat tenuous step, then, to say that the fifth amendment prohibits the second inference to be drawn by the trier of fact on its own initiative without aid of comment or instruction. Therefore, the second inference may very well be valid.

⁴⁷ 380 U.S. at 615.

⁴⁸ 308 U.S. 287 (1939).

⁴⁹ *Id.* at 293.

⁵⁰ 380 U.S. at 613-14.

⁵¹ 18 U.S.C. § 3481 (1948).

⁵² 380 U.S. at 614.

⁵³ *Ibid.*

⁵⁴ The Court in *Griffin* reserved decision on this point. *Id.* at 615, n. 6.

In practice, if the second inference cannot be commented or instructed upon, section 413 would have its maximum effect when a judge is the trier of fact. The possibility still exists that a jury would draw the inference contained in section 413. However, this would depend entirely upon its own reasoning, since it cannot be told to do so. The issue will most likely be raised where the prosecutor has made borderline comments which allude to the defendant's silence.⁵⁵ Here, the defense counsel would request instructions to the effect that not only can no presumption be made from defendant's refusal to take the stand (a right given him by section 913), but also that the jury is not to consider the failure of the defendant to explain or to deny evidence against him by his testimony. Whether defendant has a right to this instruction under the fifth amendment will determine the validity of the inference created by section 413.

Waiver of the Privilege

Although a full consideration of waiver of the privilege against self-incrimination is beyond the scope of this note,⁵⁶ the recent case of *People v. Ing*⁵⁷ has presented an interesting question concerning the waiver doctrine and its relation to section 413 and the *Griffin* rule.

Ing was charged with three counts of rape. In its attempt to show a common scheme or plan, the prosecution had presented testimony of four women who had gone to defendant to procure abortions. These witnesses testified that they had received injections which rendered them unconscious, during which time they believed defendant had engaged in sexual intercourse with them.

Defendant took the stand and denied complicity in the offense charged against him by one of the women. He did not testify concerning the evidence given by the other three. On cross-examination, he was questioned as to his relationship with the other three. Defense counsel's objection was sustained: the question was beyond the scope of the direct examination. In his argument to the jury, prosecution made repeated references to accused's failure to explain the testimony of the three women. Defendant's theory on appeal was that in so commenting, the prosecution had violated the no comment rule laid down in *Griffin*. The court, in holding that the accused's failure to explain or deny the testimony of the women was a proper subject for comment, relied on *Caminetti v. United States*⁵⁸ and *Johnson v. United States*⁵⁹ in declaring: "Since defendant in the instant case testified on his own behalf, his contention that the comment and the instruction by the trial court was a violation of his constitutionally guaranteed right against self-incrimination fails. This right was waived when he became a witness."⁶⁰

⁵⁵ See, e.g., *People v. Culp*, 241 A.C.A. 445, 50 Cal. Rptr. 471 (1966); *People v. Bowman*, 240 A.C.A. 360, 49 Cal. Rptr. 772 (1966); *People v. Von Blum*, 236 Cal. App. 2d Supp. 943, 47 Cal. Rptr. 679 (App. Dep't Super. Ct. San Diego, 1965).

⁵⁶ See generally 8 WIGMORE, EVIDENCE § 2276 (McNaughton rev. 1961, Supp. 1964).

⁵⁷ 242 A.C.A. 261, 51 Cal. Rptr. 317 (1966).

⁵⁸ 242 U.S. 470 (1917); accord, *People v. Clapper*, 233 Cal. App. 2d 34, 43 Cal. Rptr. 105 (1965).

⁵⁹ 318 U.S. 189 (1943).

⁶⁰ 242 A.C.A. at 273, 51 Cal. Rptr. at 324. *But cf.* *People v. Mortenson*, 241 A.C.A. 173, 50 Cal. Rptr. 269 (1966), where it was held that the case must be reversed

Thus, a comment or instruction based on section 413 is constitutionally valid where defendant waives the privilege by taking the stand.

Scope of Permissible Comment

There are two aspects to the scope of permissible comment under the *Griffin* rule in California. First, it must be decided how to treat cases tried prior to *Griffin* which had not reached final judgment.⁶¹ Second, a test must be devised which would provide the prosecutor some degree of certainty as to what may be said in future trials under the *Griffin* rule.

The California Supreme Court ruled that the existence of the *Griffin* error in comments and instructions did not make a case reversible per se in *People v. Bostick*.⁶² The court pointed out that this holding was in line with cases prior to the 1934 amendment. The test set out in *Bostick* was based on section 4½ of article VI of the California constitution. This test for reversible error is whether a "miscarriage of justice" has resulted.⁶³ If an instruction or comment is given which violates the *Griffin* rule, the appellate court must decide if the instruction or comment was sufficiently prejudicial to the defendant to warrant a new trial. Under the test, if the evidence is overwhelmingly against the defendant, the instruction or comment probably had little to do with the verdict, and the conviction will not be reversed. In other cases, the state's case may be less substantial and such an instruction or comment may very well tilt the scale against the defendant. Cases since *Bostick* have followed the same rule.⁶⁴

As for future cases under the *Griffin* rule, the question of how to define the scope of permissible comment remains open. The reversibility test may be sufficient on appeal, but it does not help the trial court or counsel in determining if a comment violates the *Griffin* rule. The test of whether or not a comment violates forbidden ground is difficult to formulate, for it depends on the facts and circumstances of the particular case. In *Morrison v. United States*⁶⁵ and again in *Knowles*

due to violation of the *Griffin* rule even though defendant had testified to his weight at the time of arrest for use in a formula indicating the extent of intoxication. The opinion was modified in *People v. Mortenson*, 241 A.C.A. 677, 678, 50 Cal. Rptr. 269, 270, where it was held that no exception should be made to the waiver rule in future cases, especially those cases subsequent to *Griffin*. However, the holding was not changed because the court felt the defendant's testimony was limited to a subsidiary fact, advantageous to both sides in the case. Cf. *People v. Steele*, 235 Cal. App. 2d 798, 812-13, 45 Cal. Rptr. 601, 610-11 (1965).

⁶¹ While the Supreme Court in *Tehan v. United States*, 382 U.S. 406 (1966), held that the *Griffin* decision was not to have retroactive application, this holding had no effect on the cases that had not reached final judgment.

⁶² 62 Cal. 2d 820, 44 Cal. Rptr. 649, 402 P.2d 529 (1965). The question whether comment on accused's failure to testify is reversible error per se is now before the United States Supreme Court, the California Supreme Court having held that it was not reversible error per se in *People v. Chapman*, 63 Cal. 2d 178, 45 Cal. Rptr. 729, 404 P.2d 209 (1965), cert. granted sub nom. *Chapman v. United States*, 383 U.S. 956 (1966).

⁶³ *People v. Watson*, 46 Cal. 2d 818, 834, 299 P.2d 243, 253 (1956).

⁶⁴ See, e.g., *People v. Bowman*, 240 A.C.A. 360, 49 Cal. Rptr. 772 (1966) (comment resulted in no miscarriage of justice); *People v. Moore*, 239 A.C.A. 64, 48 Cal. Rptr. 475 (1965) (violation of *Griffin* rule resulted in a miscarriage of justice).

⁶⁵ 6 F.2d 809 (8th Cir. 1925).

v. *United States*,⁶⁶ the following test was devised to determine if a particular comment violated the federal statute:⁶⁷

Was the language used manifestly intended to be, or was it of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify?⁶⁸

Such a "reasonable comment" test offers little help to the prosecutor who must tread cautiously when the self-incrimination privilege is invoked.⁶⁹

Willful Suppression of Evidence

Section 413 allows the trier of fact to make an adverse inference from a party's willful suppression of evidence. The source of this rule is section 1963(5) of the Code of Civil Procedure and the meaning given to this section by judicial interpretation.

Criminal cases dealing with the subject of an adverse inference from the willful suppression of evidence have produced a variety of results. If willful suppression is taken to mean a party's failure to explain or to deny by his own testimony evidence within his knowledge, then the *Griffin* rule has invalidated this aspect of the section in the absence of waiver. Cases prior to *Griffin* have cited section 1963(5) as standing for this proposition.⁷⁰

But there are circumstances where defendant's failure to testify is irrelevant to the willful suppression issue. In *People v. Kendall*,⁷¹ defendant relied on the privilege of silence. Evidence indicated that he had attempted to keep material witnesses from testifying before the grand jury. Defendant's wife had offered to pay a witness' expenses if she would be absent from the state at the time of the trial. The court held that the jury is allowed to infer a consciousness of guilt from these actions.⁷²

Section 1963(5) of the Civil Code of Procedure has been cited in connection with prosecution's failure to produce witnesses.⁷³ *People v. Crowder*⁷⁴ pointed

⁶⁶ 224 F.2d 168 (10th Cir. 1955).

⁶⁷ 18 U.S.C. § 3481 (1948).

⁶⁸ *Morrison v. United States*, 6 F.2d at 811 (8th Cir. 1925).

⁶⁹ "An indirect comment upon the failure of the accused to testify is quite as hurtful as a direct one, and this court has often held that the consequences of the violation of the statute were not to be avoided by the adroitness of counsel in selecting indirect rather than direct means of disregarding it." *Boone v. State*, 90 Tex. Crim. 374, 377, 235 S.W. 580, 582 (1921).

⁷⁰ E.g., *People v. Neely*, 163 Cal. App. 2d 289, 329 P.2d 357 (1958); *People v. Peters*, 149 Cal. App. 2d 94, 308 P.2d 42 (1957); *People v. Goldstein*, 136 Cal. App. 2d 778, 289 P.2d 581 (1955).

⁷¹ 111 Cal. App. 2d 204, 244 P.2d 418 (1952).

⁷² *Id.* at 213, 244 P.2d at 424.

⁷³ In *People v. Romero*, 244 A.C.A. 564, 53 Cal. Rptr. 260 (1966), comment referring to defendant's failure to produce witnesses was held proper. The opinion cited sections 412 and 413 of the Evidence Code: "The reference of which complaint is made in this case did not request that an unfavorable inference be drawn from the defendant's failure to testify, but that such inference be drawn from his failure to produce his companions as witnesses. (See Code Civ. Proc., § 2061, subs. 6 and 7; Evid. Code, §§ 412, 413.) The reference to the defendant's constitutional right was to distinguish his failure to testify, from which no inference could be drawn, and the

out that failure to produce the defendant's wife as a witness permitted the inference that her testimony would have been adverse to the People's case had it been presented. However, section 413 of the Evidence Code fails to cover this particular situation because of its narrow wording. It states: "in the case *against* a party . . ." This language implies that the section is to be used solely against defendants, and not in their favor. Thus, while *Crowder* did come under section 1963(5) of the Code of Civil Procedure, it would not have come under Evidence Code section 413. Nevertheless, section 413 is at least valid under circumstances similar to *Kendall* where a defendant suppresses evidence other than his own testimony.

The Gainey Case

*United States v. Gainey*⁷⁶ questioned the constitutionality of a federal statute⁷⁶ which allowed the jury to infer guilt from defendant's unexplained presence at the site of an illegal distillery business. The Supreme Court upheld the statute, saying there was a rational connection between the presence and the crime.⁷⁷ The Court further held that the jury was permitted, but not required, to find the defendant guilty.⁷⁸

The dissenting opinion,⁷⁹ by Justice Douglas, author of the majority opinion in *Griffin*, revealed the inconsistency of the majority holding in light of the federal no comment rule. Douglas argued that the Court's ruling compelled a defendant to risk self-incrimination or face an inference of guilt by the jury. The majority opinion answered by saying that "the judge's overall reference was carefully directed to the evidence as a *whole*, with neither allusion nor innuendo based on the defendant's decision not to take the stand."⁸⁰

The California case of *People v. DeLeon*⁸¹ concerned the possession of stolen property, which must be explained at the peril of an inference of guilt of the crime of burglary,⁸² much like the federal statute in *Gainey*. The court's opinion gives a clue as to how future cases may resolve the *Gainey—Griffin* dilemma.⁸³ The *DeLeon* holding seems to allow the jury to consider, presumably through comment and instruction, an inference of guilt from the possession of stolen goods if the defendant has failed to "show" that his possession was honestly acquired. The court declared: "We have already concluded that the California rule upon which this instruction is based . . . does not compel the defendant to testify, [but]

failure to summon his companions to appear and explain his activities and state of sobriety from which the inference was requested." *Id.* at 571-74, 53 Cal. Rptr. at 264-66.

⁷⁴ 126 Cal. App. 2d 578, 272 P.2d 775 (1954); *accord*, *People v. Hall*, 186 Cal. App. 2d 388, 8 Cal. Rptr. 760 (1960).

⁷⁵ 380 U.S. 63 (1965).

⁷⁶ INT. REV. CODE OF 1954, § 5601(b)(2).

⁷⁷ 380 U.S. at 66.

⁷⁸ *Id.* at 70.

⁷⁹ *Id.* at 71.

⁸⁰ *Id.* at 72. (Emphasis added.)

⁸¹ 236 Cal. App. 2d 530, 46 Cal. Rptr. 241 (1965).

⁸² *People v. McFarland*, 58 Cal. 2d 748, 26 Cal. Rptr. 473, 376 P.2d 449 (1962).

⁸³ For a discussion of this problem see *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 159 (1965).

only to 'show' that his possession was honestly acquired."⁸⁴ Earlier discussion⁸⁵ has suggested that section 413 be modified to read: "the party's failure to explain or to deny by his *evidence*," rather than "*his testimony*." *Quaere*: Is this not equivalent to the phrase: "the party's failure to 'show' by his evidence?" If so, the *DeLeon* case reinforces the general proposition that comment may be made to the effect that certain evidence is uncontradicted.

Conclusion

The *Griffin* rule has certainly limited the operation of section 413 in criminal cases, but not to the extent of making the provision completely void. The situations presented are suggested as ways to save the section from complete invalidity.

Certainly when there has been a waiver of the privilege against self-incrimination, section 413 has validity and allows comment on evidence unexplained or undenied by the accused. Another instance where section 413 may be valid is in cases where there is evidence of willful suppression of evidence as seen in *Kendall*. Here, it may be that a change in the wording of section 413 is advisable in order to avoid its narrow application against defendants only.

The *Gainey* and *DeLeon* cases, which both involved specific inferences peculiar to their facts, also reveal possible situations where an inference similar to that created by section 413 may be applied. However, these instances are less compelling than the waiver and willful suppression situations. Comment and instruction on evidence as a *whole* to the effect that prosecution's evidence is uncontradicted does not appear to be in violation of the fifth amendment. Here again, it may be necessary to amend the wording of section 413 to eliminate reference to the party's own testimony.

Finally, a more tenuous situation is presented where the jury is permitted to draw an inference, without the aid of instruction or comment, from the defendant's lack of explanation or denial of adverse evidence by his testimony. In this situation, section 413 would prohibit instructions directing the jury to ignore the fact that certain evidence is unexplained or undenied by defendant's testimony. *Griffin* seems to condone this view by certain language contained in the opinion.⁸⁶

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⁸⁴ 236 Cal. App. 2d at 539, 46 Cal. Rptr. at 247.

⁸⁵ See note 45 *supra* and accompanying text.

⁸⁶ See note 53 *supra* and accompanying text.

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